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SUPREME COURT DECISION.

Following is an abstract of an opinion of the supreme court of Arizona, delivered at its late session. All the valuable points in the case and rulings thereon are given with little or no abridgment. The cause is entitled John G. Campbell and James M. Baker, appellants, against David W. Shivers, respondent, and involves the right to water for irrigation and incidentally the power of the supreme court to fix the times for holding the district courts, and is deemed the most important case passed upon by the court at its late session. Gov. Bashford was attorney for appellants and James E. McCaffry and John A. Rush for respondents. The case was appealed from the district court for Yavapai county. The opinion was written by Titus and Tweed concurred in the judgment.

A judgment for the defendant, Daniel W. Shivers, in the district court of the third judicial district, at the suit of the plaintiffs, John G. Campbell and James M. Baker, for the alleged unlawful use of water in irrigating, is the cause of this appeal. The appellants here were the plaintiffs below; the defendant there is the respondent here; and the record by the transcript discloses the following conclusions of fact: In the month of March, 1867, the defendant moved to Chino valley, in the county of Yavapai, near Fort Whipple about twenty-five miles north of Prescott, took possession of the ranch which he now occupies and has ever since occupied. Along with his ranch, he has ever since used and still continues to use for purposes of irrigation, one-fourth of the water which flows through the defendant's ranch, but also to or through the ranch of Robert Postle, George Banghart and the ranch of the plaintiffs. The use of one-fourth of the water flowing through the ditch or drain above described from February 1, 1870, to January 1, 1872, is the wrong of which the plaintiffs complain; and they claim with their costs damages in the sum of $2000, which they aver they have suffered by that alleged unlawful use of the water described. The defendant denies that his use of the water was unlawful at all; denies that he has damaged the plaintiffs and asks to be dismissed with his costs.

This is the issue tried in the court below, and the correctness of the verdict and judgment thereupon in favor of the defendant, is the question to be reviewed by this court. It is to be regretted that the settlement in Chino valley, of which the property in question constitutes part, was not more fully and correctly described than it is in the record of the case. The ranch of the plaintiffs in two of the deeds submitted in evidence on the trial of the case, is described as situated west of Postle's ranch, while the same ranch, in two other deeds submitted in evidence on the trial, is described as situated north of Postle's ranch. The order of the several ranches on the ditch or drain which conducts the water for their common irrigation, is not given; while their boundaries are evidently omitted, not only in the pleadings and evidence, but even in such deeds of them as have been submitted in evidence on the trial of this case. The water right in controversy is wholly omitted from the original deed of the plaintiffs' title, as the same appears in evidence, while their counsel is found denying the defendant's claim to contest this very right with them because of the same omission from his own deed. The court is thus left to conjecture, and counsel are involved in absurdity on matters of the utmost importance in the discussion of questions such as this case presents. It seems that Postle's ranch is above all others on the ditch or drain which is the common medium of supply, and about three-quarters of a mile from the mass of the water upon which all depend. The relative positions of the ranches of the plaintiffs and defendant, do not appear except from conjecture. Of all those who depend on a single drain or ditch for water, it is impossible for any one to exhaust or reduce the supply of others, excepting such as are below him on the same ditch or drain. The plaintiffs claim that the defendant has done this for them. From this it would seem to be a presumption of fact that the ranch of the defendant is higher up the ditch or drain and nearer the common source of the water supply, than the ranch of the plaintiffs. Of ranches located or situated for purposes of irrigation, other things being equal, those nearest the water supply are first chosen. From this it would also seem to be a presumption of fact that the ranch of the defendant must have been located if not anterior at least cotemporaneous with that of the plaintiffs. The legal deductions from these presumptions of fact will be stated hereafter. Further references to the facts of this case will be made in conclusion with the points to which they pertain.

No assignment of errors has been made in this case excepting such as appear in the briefs of counsel. There were seven points presented by the counsel of the appellants against the judgment; but the court proceeded to examine the last or seventh point first, which is as follows: The court should have sustained the objection of the plaintiffs that the court was not legally in session, giving as a reason that as the above cited exception is first in practical order and if allowed must impel this court to reverse the judgment in the case, it is here considered first. The legislature of this Territory has from its origin assumed that it is authorized to fix the terms of the supreme and district courts. Till the present case, no conflict has arisen on this subject between this court and the legislature, because the practice of the court has been to adopt and ratify the action of the legislature in regard to the terms of the district court. The opinion then quotes the act of the legislature fixing the terms of the district courts, and proceeds as follows: This distribution of the terms of the district courts was undoubtedly a defective execution of the order of Congress, because it contained no limitation to the sessions of the court. It was just such legislation as enabled a Mormon district judge to sit 120 days, not for the transaction of business, but to charge the federal government an enormous bill of expenses—an abuse or rather [illegible] of the abuses which induced the Act [illegible]ress of 1856, which will be cited [illegible]. The ratifying [illegible] court supplied this [illegible] ing necessary limitation. It was found however that the interval, only two weeks between the Yuma and Yavapai terms, was absolutely too brief to enable the United States district attorney to transact the United States business at one of these courts and reach the other in time for it. Accordingly the legislature was invited to join the judges of the supreme court in amending this order, not because these judges doubted their power to alone make the order, but to avoid every appearance of disrespect towards the legislature, and all possibility of exception—such as has been taken in the present case. The legislature refused to act and the judges of the supreme court, not doubting their authority, made and promulgated the following order.

The opinion then gives the order in full, and follows by explaining the necessity for such order and then continues: The authority of this court to make the order in question is derived from the Act of Congress of August 16, 1856, which is as follows: "Section 5. That the judges of the supreme court in each of the Territories, or a majority of them shall when assembled in their respective seats of government, fix and appoint the several times and places of holding the several courts in their respective districts and limit the duration of the terms thereof; provided that the said courts shall not be held at more than three places in any Territory; and provided further that the judge or judges holding such courts, shall adjourn the same without day at any time before the expiration of such terms, whenever in his or their opinion, the further continuance thereof is not necessary." Then follows a history of the act, with references to opinions of other courts relative to the subject and concludes by saying: The supreme judges of this Territory therefore had the power to appoint the regular terms of the district courts for each of the several entire districts, and this exception to the contrary is overruled.

The error first assigned on the brief of appellants' counsel, and the one next to be considered, is as follows: The court erred in charging the jury that if defendant had been in possession of the said property five years plaintiffs must fail in this action. To this the appellants' counsel adds: "The owners of the property in question were tenants in common of the ditch and water right—the possession of one being the possession of all." The latter statement is certainly true and it is an abandonment of this exception. This unity of possession which makes the defendant a tenant in common with the plaintiffs, protects him from all disturbance by them or either of them. He can call upon them to account for any invasion of his rights, and his unity of possession can only be dissolved by proceedings in partition, or by amicable agreement. If this is not so, then from all that appears in the case, the five years and some months which elapsed between the defendant's entry upon the enjoyment of the water right in March, 1867, and the institution of this suit in August, 1872, must bar the plaintiffs' recovery. Compiled Laws, page 33, Section 3. From all that appears in the present case, therefore, the defendant is entitled to the protection which is due to a tenant in common or to the statute of limitations, and in either event this exception must be and is overruled.

The next exception is: The court in rejecting the evidence offered by plaintiffs of a meeting held by Banghart, Brown and Postle, in which the two former refused to let defendant have any of the water claimed by them, that Postle said he would let him have of his, and that there was no other understanding between the parties. No legal right of the plaintiffs was infringed by the rejection of this evidence. The defendant was not present at this meeting either personally or by representation. The declarations of the persons present, whether confined to the parties themselves or communicated to the defendant, could not effect his legal rights, unless it should appear that he in some way accepted or assented to them. It does not appear that his acceptance or assent was shown or proposed to be shown. This exception is therefore overruled.

The third exception is: The court erred in refusing to give the third instruction asked for by the plaintiffs' counsel—that defendant having asserted a right under the deed of Degrallo is bound by it, and that the statute of limitations does not begin to run until he claims under the right now set up by him." It does not clearly appear either from the record or argument upon it, what is meant by this exception. To be at all available for the plaintiffs, it must be found to refer to some portion of the evidence in the case. The only portion of the evidence to which this exception appears to be responsive, is defendant's allegation that "early in 1867, Brown offered him a ranch in Chino valley as an inducement for him to bring his family and settle there." This seems to be that which this exception describes as "the right now set up by him." The exception assumes that this is in some way fatally conflicting with the defendant's having asserted a right under the deed of Degrallo, and that this severed the tenancy in common which is asserted by the plaintiffs' first exception, and formed an era in the case, which put the statute of limitations in active operation. Such, however, is not the legal effect of this testimony. There is really no conflict in the defendant's claiming at one time under Degrallo's deed and at another under Brown's promise. They are parts of one complex transaction in which the deed appears as the fulfillment of the promise previously made. The defendant might at one time assert that Brown's promise was the consideration which actuated him; at another the $500 mentioned in Degrallo's deed; at another the deed itself; and at other times any two of these; or, all three of them together; and yet he would forfeit no legal right and incur no legal hazard. The defendant in his conversations on this subject with Brown himself or with Brown's grantees, would naturally refer to Brown's promise, with strangers to Degrallo's deed, and in stating the cost of his ranch and water-right to anybody, he might allege the $500 mentioned in the deed, by which he and his must expect to hold them and be guilty of no breach of legal or moral truth and incur no forfeiture or hazard. No error appears in the charge thus excepted to and the exception must be overruled.

The fourth exception is as follows: The court erred in its charge to the jury, that plaintiffs were estopped by the declarations of Brown." The exception does not fully state the charge of the judge upon the trial of this case nor the evidence to which it refers. The charge was thus: Again, if Brown did represent to defendant while he, Brown, was in possession of the property now claimed by the plaintiffs, that one-fourth of the water flowing in the ditch was the property of Degrallo, and used the inducements alleged to induce the defendant to go there and settle, and defendant relying on his representation did so go to that valley and enter upon the possession of the ranch and water-right under and by virtue of any alleged purchase or agreement with Brown or Brown and Postle from or with Degrallo, these plaintiffs are estopped, as Brown himself would be if he were the plaintiff in this action, from denying such right of defendant to one-fourth interest in the water-right forever after, and this if Degrallo never had any right or interest in the property, whatever, or if there was no such man in being. The whole of this exception must be taken together with the evidence to which it refers, in estimating its legal effect. On recurring to the testimony, we find that the defendant took possession of his ranch and one-fourth of the water now in controversy in March, 1867, and has ever since used and enjoyed both; and that the deed of Degrallo to defendant was recorded April 11, 1867. Brown's deed to Schneider is dated November, 1867. Schneider's deed to Campbell, one of the plaintiffs, and Buffum, is dated August, 1868; and Campbell's deed to Baker, the other plaintiff, is dated March, 1872. The only principle upon which Brown's grantees, the present plaintiffs, can deny the binding effect upon them of Brown's declarations concerning the water to the defendant, would be that they had no notice of them. In respect to this, the presumption of law is that Campbell and Baker exercised ordinary diligence in ascertaining the conditions and relations of their ranch, at the time they took possession in November, 1867, and in March, 1872. The law requires of them ordinary diligence in all such matters as this water controversy, in which others are concerned. The law will hardly take from the defendant his ditch-water and give it to the plaintiffs in pity or approval of their self-imposed ignorance at the time they purchased the ranch. The opinion further proceeds to examine the evidence on this point and concludes: If this court had any doubt of the conclusion above stated, the defendant's right could be maintained on the ground of paid license. It has none, however, and this exception must be overruled.

The fifth and last exception is as follows: The court erred in its charge to the jury that there must be a preponderance of evidence in favor of plaintiffs to entitle them to recover." The proposition thus excepted to would seem so axiomatic as to defy either question or discussion. If in any case the evidence should be equal on one side and on the other, how could the jury find a verdict at all? The jury would be compelled to agree to disagree in such a case, and thus the trial would fail. In cases such as this, if they actually do occur, it is the highest duty of the jury to disagree. To enable a jury therefore to find a verdict at all in any case in which there is a conflict of testimony, there must be a preponderance of evidence in favor of one side, and the jury must find it as a condition precedent to the rendition of their verdict. That the judge thus stated a truism to the jury, on the trial of this cause, is no matter of successful exception, and this exception is accordingly overruled.

The exceptions of the appellants thus all fail and there is nothing else in the record to show why the judgment in this case should not be affirmed. This conclusion, it is submitted, if there were any doubt of its legality, could be sustained on the evidence which the case presents of a parol license to the defendant of the water-right in controversy. And the same conclusion is reached by another most simple process of investigation. It was found as a presumption of fact in the statement of this case that the defendant was located higher up on the ditch and nearer the source of water-supply than the plaintiffs; and also as another presumption of fact that his location was therefore older than theirs. By a very simple deduction, the legal conclusion therefore is "prior in tempore-potior in jure," in the absence of all sufficient evidence to the contrary, that the defendant's right is better than that of the plaintiffs. The judgment of the court below in the present case is therefore hereby affirmed.

CAMP GRANT ITEMS.—James Flannery, a citizen packer in government employ, and private Peck, 5th Cavalry, deserted from this post on the 27th of January taking with them four head of government stock. David Mears, citizen in government employ, and four soldiers started in pursuit of them.

Work at this post is still going on rapidly. The saw-mill, shingle-machine and planing-machine are in good working order. Work on the shingle-machine is kept up until midnight.

During the recent heavy rainfall, the dam at the government saw-mill was entirely washed away.

Warner Buck, post trader here, is daily expecting the arrival of a new stock of goods from San Francisco.

The summit of Mount Graham is covered with snow to the depth of from two to five feet.

At a recent lottery at this post the following prizes were drawn: One horse, saddle and bridle valued at $100, by Sergeant Perry, 5th Cavalry: One double barrelled shot gun valued at $60, by Sergeant Thomas McLane, 23d Infantry; cash gift of $50, by private Woods, 5th Cavalry; cash gift of $25, by private Hauser, 5th Cavalry: cash gift of $25, by private Daney, 5th Cavalry; cash gifts of $10 each, by privates Quigly, Nunnamaker, 5th Cavalry, and Emil Rohle, Pierce Keene, 23d Infantry, and by Commissary Sergt. Schenke.

HERE are a few military items gathered from The Army and Navy Journal: December 30, private Fred. Swift, Company L, 5th Cavalry, was discharged; also on December 29, private James Langley, alias Robert Buxton, Company G, 23 Infantry. January 5, private William Williams, Company I, 12th Infantry, was transferred to the band of the 23d Infantry. December 30, the leave of absence granted to Capt. A. H. Nickerson, aide-de-camp, was extended ten months on surgeon's certificate of disability, with permission to go beyond the sea. January 9, private Dennis Mullaney, Company D. 5th Cavalry, was discharged by the war department; and on the 10th, private James Ross, Company H, 23d Infantry was discharged by the same authority.

LAST December 6, we published on authority of another journal that Dr. D. C. Marsh, formerly collector of customs in the district of Paso del Norte (including Arizona) was a defaulter in the sum of $6,783.59. The Borderer of last Saturday has the following item on the subject, which we gladly republish:

We are glad to learn that Mrs. Marsh, of El Paso, has received a letter from the revenue department, stating that the accounts of Dr. Marsh are balanced and that an amount of about $1600 is placed to his credit, subject to her order.

THE ALTA'S Washington correspondent wrote this:

Mrs. Delegate McCormick, the bride of the Governor of Arizona, is a charming little lady, who presides over the household of one of the most popular men in this city of prominent men. She has left the paternal mansion of Senator Thurman and has added the spice of the matronly care of her excellent and worthy mother to her new home, where she is surrounded by the elegance of art and social refinement, and visited by the elite of Washington.

B. W. REAGAN was in from Florence this week. He had some splendid specimens of copper and silver ore obtained from a very large ledge in the Pinal mountains about forty miles from Florence. The workmen have two shafts down about twenty feet each. Mr. Reagan tells us that the amount of ore equal in richness to the samples with him, is simply immense. From all accounts at hand, we have no doubt but Pinal district is wonderfully rich in silver and copper.

DOUBTS seem to exist as to whether or not Capt. Jeffords has resigned his office of Indian agent. It was reported in Washington January 1, but the dispatches say no official announcement of it had been made. Captain Jeffords told us a month ago that he had resigned and that is all we know about it.

"THE evidence shows that he sot up with her night after night, and they squoze hands and talked soft, and I think she ought to have about $23 damages"—was the charge of an Idaho judge to a jury.